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SUPREME COURT, U. S.

FILED
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In the Supreme Court of the United States

No. 863

[redacted]

[redacted]

Appellant,

vs.

STATE OF OHIO,

Appellee.

MOTION TO DISMISS

[redacted]

Prosecuting Attorney of Cuyahoga County,

[redacted]

Assistant Prosecuting Attorney,

[redacted]

Attorneys for the State of Ohio, Appellee.

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In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1957.

EMIL JACK PORCHETTA,
Appellant,

vs.

STATE OF OHIO,
Appellee.

MOTION TO DISMISS.

Now comes The State of Ohio, the appellee, and pursuant to Rule 16, paragraph 1(b) of the Revised Rules of the Court, moves that the Court dismiss this appeal, upon the following grounds:

1. It does not present a substantial federal question.
2. The federal question sought to be raised was not timely or properly raised or expressly passed on.
3. The judgment sought to be appealed rests on an adequate non-federal basis.

STATEMENT OF THE CASE.

No statement of the case is made by appellee as the statement in appellant's jurisdictional statement is almost identical with that made in the brief filed by the State in the Supreme Court of Ohio opposing appellant's appeal to that Court.

QUESTION PRESENTED.

The appellant claims that he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that he was convicted of a felony under a criminal statute as the result of the alleged remarks of the prosecuting attorney in addressing the jury.

The comment of the prosecutor which the appellant claims amounts to a lack of due process appears in the record of the trial as follows:

> "The Prosecutor: I think, ladies and gentlemen, that he owed you that duty, to tell his story, to tell us what he did on May 13th and May 14th of 1955. He should have told us a little bit about his life, what type of work he does, his family life, *his past history, whether or not he has a record*—
>
> Mr. Firestone: I object to that.
>
> Mr. DeRocco: —or anything that would affect him.
>
> Mr. Firestone: Objection.
>
> The Court: The jury will disregard that. Proceed."

It is submitted that since the italicized portion, "whether or not he has a record" is in the alternative, this comment in no way prevented the defendant from having a fair trial. Nowhere in the record can it be shown that the prosecutor, directly or in any other manner, stated to the jury that the defendant had a past criminal record, despite appellant's inferences based on misquoted comments contained in his brief.

Section 2945.43 of the Revised Code of Ohio, which is apparently the basis for the repugnancy claimed by appellant, provides:

> "On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel."

The burden of showing that the jury was improperly influenced by the remarks of the prosecutor is upon the appellant.

A similar remark by a prosecutor was involved in the case of *State vs. Landrum*, 96 O. App. 333. In the opinion of the Court of Appeals it is said (p. 343):

> "Since the verdict is supported by evidence so overwhelming, misconduct of the prosecuting attorney in his final argument, we feel, is reduced to a negligible quantum from the standpoint of its effect upon the verdict in the case. It should likewise be noted that none of the statements of the prosecuting attorney complained of involved language directly bearing upon the guilt of the defendant of the crime charged."

and cited the following from *State vs. Navone*, 58 P. (2d) 1208, 1210 (Supreme Court of Washington):

> "Misconduct is to be judged not so much by what was said or done, as by the effect which is likely to flow therefrom. What would be misconduct in one case might very well be held not to be misconduct in another. Each situation involving the question of misconduct must stand by itself and must be considered in the light of all its facts and circumstances to the end that verdicts properly arrived at shall not be disturbed and that those verdicts which may have been induced by prejudice or by something beyond the issues shall not be allowed to stand."

The Court of Appeals concluded (p. 344):

> "Keeping in mind the above factors, together with the fact that the jury was explicitly instructed by the

trial court not to consider the arguments of counsel as evidence in the case, we unanimously conclude that the verdict of the jury is not contrary to law."

Section 2945.83 of the Revised Code of Ohio, governing the Ohio courts on review, provides:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

* * *

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby.

* * *

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

The rule in Ohio is in conformity with the ruling of this Court as expressed in *United States v. Handy*, 351 U. S. 454:

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'

"See also, Adams v. United States, 317 U. S. 269, 281, 87 L. ed. 268, 276, 63 S. Ct. 237, 143 ALR 435; Buchalter v. New York, 319 U. S. 427, 431, 87 L. ed. 1492, 1496, 63 S. Ct. 1129; Stroble v. California, 343 U. S. 181, 198, 96 L. ed. 872, 885, 72 S. Ct. 599."

This Court pointed out in the *Handy* case that Justice Holmes, speaking for a unanimous Court in *Holt v. United States*, 218 U. S. 245, 251, 54 L. ed. 1021, 1029, 31 S. Ct. 2, 20 Ann. Cas. 1138, cautioned that

"If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

ABSENCE OF JURISDICTIONAL REQUIREMENT FOR APPEAL.

The appeal should be dismissed for the reason that the notice of appeal indicates no jurisdictional basis for an appeal to this Court. Nowhere is there any statement that the validity of a statute of the state of Ohio was in issue on constitutional grounds or that the decision of the Supreme Court of Ohio sustained the validity of a statute on that basis. Such general and indefinite statements are inadequate and present no question for the decision of the Court. *Seaboard Airline Railway vs. Watson*, 287 U. S. 86.

The appellant herein seeks a review of the decision of the intermediate court on the ground that his appeal as of right to the Supreme Court of Ohio and his motion for leave to appeal were dismissed by that Court and such dismissals did not amount to an affirmance on the merits. But at no time did the appellant raise in the court of appeals the question of the constitutionality of any statute involved in the trial of his case on the ground of its being repugnant to the Constitution of Ohio or to the Constitution of the United States. The constitutional issues appellant seeks to raise were presented by him for the first time in the form of somewhat general and indefinite statements in his attempt to appeal to the Supreme Court of Ohio, and again in his application in that Court for a rehearing of his motion for leave to appeal. It is the rule in Ohio that constitutional questions which were not raised in either the trial court or the court of appeals would be deemed waived in the Supreme Court of Ohio. *The Village of Clarington vs. Alther*, 122 Ohio State 608, 174 N. E. 251, and likewise

that the appellate court cannot consider the question of constitutionality of statutes which is presented for the first time upon appeal; *State vs. Miller*, 28 Abs. 573.

It is submitted that the Ohio courts did not decide in this case any federal question of substance not theretofore determined by this Court, nor has the state court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved in this appeal and therefore the motion of the appellee to dismiss the appeal should be granted.

Respectfully submitted,

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio.

DON DEROCCO,

Assistant Prosecuting Attorney,

Attorneys for Appellee.